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No. 89-1754

In The

Supreme Court of the United States

October Term, 1989

TEXACO REFINING AND MARKETING INC.
and
TEXACO MARINE SERVICES INC.,

Petitioners,

v.

THE ESTATE OF DAU VAN TRAN,
VI THI PHAM and DO VAN TRAN,

Respondents.

RESPONDENTS' REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Have Petitioners waived their right to urge their current points of error that the Texas Wrongful Death Act is inapplicable to the present case?

2. May a state court apply its wrongful death act in a case arising out of the death of a non-maritime civilian volunteer on a dock located within a state's territorial waters?

3. Does the tort made the basis of this suit constitute a maritime tort within the meaning of federal maritime law, since the case involves a non-maritime civilian volunteer who was killed on a dock?

CERTIFICATE OF INTERESTED PARTIES

The following were parties in the proceedings below in addition to those parties identified in the caption hereof:

Farmer Boy's Catfish Kitchens International, Inc.
Theresa Nguyen
Anh Nguyen

The parent of Petitioner TEXACO REFINING & MARKETING INC. is:

TRMI Holdings Inc. which is owned by TEXACO, INC.

The parent of Petitioner TEXACO MARINE SERVICES INC., is:

Texaco Overseas Holdings Inc. which is owned by TRMI Holdings Inc. which is owned by TEXACO, INC.

The following is a list of the subsidiaries and/or affiliates of TEXACO INC. which have publicly-held debt or equity securities:

Texaco Capital Inc.
Texaco Capital N.V.
Texaco International Finance Corp.
Texaco Inc.
Texaco Mexicana S.A. de C.V.
Texaco Togo
Texaco Nigeria Limited
Texaco Ghana Limited
Refineria Texaco de Honduras S.A.

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OPINION SOUGHT TO BE REVIEWED

The opinion of the Texas Court of Appeals that Petitioners seek to have reviewed was reported as *Texaco Refining & Marketing, Inc. v. Estate of Tran*, 777 S.W.2d 783 (Tex. App. – Beaumont, 1989).

STATEMENT OF JURISDICTION

Respondents contend that this Court does not have jurisdiction to consider Petitioners' Writ under 28 U.S.C. § 1257 as alleged. Petitioners have not shown that the validity of any United States or state statute or treaty is in question or that any laws of the United States are in question, or that any constitutional provision or treatise or statute thereof is at issue.

Further, Respondents contend that Petitioners have not shown that there are any special and important reasons for granting this Writ under Supreme Court Rule 17.1. Since review of the Petition For Writ of Certiorari is a matter of judicial discretion, Respondents respectfully request that the Court deny Petitioners' Writ of Certiorari.

STATEMENT OF THE CASE

In accordance with the Rules of the United States Supreme Court, Respondents desire to expand upon the statement of the case as presented by the Petitioners.

This action was a wrongful death/survivorship lawsuit stemming from an incident occurring on September

16, 1985, wherein Dau Van Tran was crushed to death while climbing up the side of a dock barge located on the Port Arthur Ship Channel in Port Arthur, Texas.

It is important to note that Dau was not a Jones Act seaman, nor a harbor worker, nor a longshoreman, but merely was a civilian volunteer, a "good samaritan," who had assisted a much older Vietnamese man untangle a rope from the propeller of the older man's boat. Dau climbed out of the water, up the side of the dock barge, just as the surge from the TEXACO CALIFORNIA slammed the boat up against the dock barge, crushing Dau.

Suit was brought by the parents of Dau against the two Texaco Defendants (Petitioners herein), under the provisions of the Texas Wrongful Death and Survivorship Statutes, alleging negligence, and against an entity known as Farmer Boy's Catfish Kitchens International, Inc., the owner/operator of the dock and fishing vessel involved in the incident. Early in the lawsuit, it was thought that Dau was a member of the crew of the vessel involved, but subsequent discovery indicated that he was not.

In their brief, Petitioners state that Respondents pleaded against Texaco that Dau was a Jones Act seaman, which is not true. The pleadings referred to apply only to Farmer Boy's, and were abandoned at the time of trial, since it turned out Dau was a volunteer and not a seaman.

Petitioners went to trial, knowing full well that Respondents were seeking recovery for various elements of damages, including mental anguish and pre-judgment

interest, under the Texas statutes mentioned above, but yet failed to plead that Respondents were not entitled to recover such damages, or that federal maritime law applied. In fact, Petitioners did not assert in the Trial Court any of the defenses they are now asserting. It was only after judgment was entered that Petitioners asserted for the first time that mental anguish damages could not be recovered; but since there were no pleadings to that effect, their Motion for New Trial was overruled by operation of law.

ARGUMENT

A. PETITIONERS HAVE WAIVED THEIR RIGHT TO URGE THEIR CURRENT POINTS OF ERROR THAT THE TEXAS WRONGFUL DEATH ACT IS INAPPLICABLE TO THE PRESENT CASE

Petitioners argue that the deceased, DAU, was a seaman, and that since he was injured on navigable waters, "general maritime law" should not only control but be the exclusive law applicable. Petitioners further argue that pursuant to general maritime law, damages for mental anguish and/or interest should not be allowed.

However, Petitioners never pled nor proved that DAU was a seaman nor that the remedies under the Texas Wrongful Death Statute, TEX. CIV. PRAC. & REM. CODE ANN. Secs. 71.001-71.002 (Vernon 1986), and the Texas Survival Statute TEX. CIV. PRAC. & REM. CODE ANN. Sec. 71.021 (Vernon 1986) were limited by general maritime law. The Petitioners proceeded to trial upon their Original Answer, in which they set up the following

affirmative defenses: (1) contributory negligence of DAU; (2) negligence of third parties; (3) assumption of the risk; and, (4) unavoidable accident. See Appendix "A" at 2a. Nowhere in the pleadings at the trial court level did the Petitioners invoke the constitutional and/or statutory provisions they now claim. In addition, Petitioners were well aware that Respondents were seeking to recover damages for mental anguish as well as for loss of companionship, affection and society. Thus, under Rule 94 of the Texas Rules of Civil Procedure (T.R.C.P.) and Texas case law, Petitioners have waived the points they now assert. Rule 94 requires a party, when pleading to a preceding pleading, to set forth affirmatively any "matter constituting an avoidance or affirmative defense." Tex.R.Civ.P. 94. An affirmative defense has been defined as "a denial of the plaintiff's right to judgment even if the plaintiff establishes every allegation in its pleadings." *Highway Contractors, Inc. v. West Texas Equipment Company, Inc.*, 617 S.W.2d 791, 794 (Tex. App. – Amarillo 1981, no writ).

A recent Texas appellate decision discussing Rule 94 is *Borders v. KRLB, Inc.*, 727 S.W.2d 357 (Tex. App. – Amarillo 1987, writ ref'd n.r.e.).

> Rule 94 of the Texas Rules of Civil Procedure requires a party, when pleading to a preceding pleading, to set forth affirmatively any 'matter constituting an avoidance or affirmative defense.' The affirmative pleading is necessary because a general denial is only a negative plea that places in issue the allegations a plaintiff is required to prove. The general denial 'does not open the way for evidence to support propositions which do not negative the plaintiff's claim, but go to support some independent reason why

> the plaintiff is barred from recovering . . . (cites omitted) 727 S.W.2d at 360.

In this case Petitioners claim for the first time on appeal that the Texas Wrongful Death Statute and Texas Survival Statute are not proper avenues of recovery for Respondents. Petitioners are thus arguing that even if Respondents' claims are true, the statutes as pled by Respondents in support of their claim do not allow them to recover under the facts of this case. This is a defense in avoidance or a defense which, if pled and proved, entirely bars Respondents from recovering for mental anguish. The following quote from *Hays Consolidated Independent School District v. Valero Transmission Company*, 645 S.W.2d 542 (Tex. App. – Austin 1982, writ ref'd n.r.e.) illustrates that the defense relied on by Petitioners is an affirmative defense:

> Affirmative defenses, as opposed to a defendant's denials, are the propositions which a defendant may assert and interpose to defeat a prima facie case made by the plaintiff. 'They open the way for the defendant to introduce evidence which does not tend to rebut the factual propositions asserted in plaintiff's case, but which seeks to establish an independent reason why the plaintiff should not recover.' 2 McDonald, Texas Civil Practice, § 7.34.1, at 220 (1982).

Thus, where a party fails to plead an affirmative defense, the trial court cannot award judgment thereon. A court's judgment must conform to the pleadings. This rule is so strict that "evidence will not cure the failure of a judgment to conform to the pleadings." *Hays*, 645 S.W.2d at 545 to 546.

The penalty for failing to plead an affirmative defense is harsh under Texas case law. According to a long line of precedent, affirmative defenses must be pleaded and proved or they are waived. *Christian v. First National Bank of Weatherford,* 531 S.W.2d 832 (Tex. Civ. App. – Forth Worth 1975, writ ref'd. n.r.e.). Since Petitioners neither pled nor proved the inapplicability of the Texas Wrongful Death Statute to this case, they waived their defense and may not assert it for the first time on appeal.

Petitioners make the convoluted argument that since Respondents pled the applicability of general maritime law to this case, that Petitioners were not required to plead the inapplicability of the Texas statute. As mentioned above, a careful reading of Respondents' pleadings shows that Respondents pled the general maritime law only as to Defendant Farmer Boy's Catfish Kitchens International, Inc. Respondents sought recovery against Petitioners only under the Texas Wrongful Death Statute and Survival Statute; thus, it was incumbent upon Petitioners to plead its inapplicability. Importantly, even had Respondents pled for recovery under both the general maritime law and the Texas Wrongful Death Act, Petitioners still would not have been relieved of the burden of proving the state statute's inapplicability to this case.

Additionally, this Court stated in *Singleton v. Wulff,* 428 U.S. 106, 121 (1976) that a federal appellate court generally does not consider an issue not passed upon below. See also *State of California v. Taylor,* 353 U.S. 553, 556 (1957). Thus, under both state and federal procedural rules, Petitioners have waived their defense by not raising it at the trial court level. See *State of California Department of Mental Hygene v. Bank of Southwest National*

Association, 354 S.W. 576, 581 (Tex. 1962); *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 419 (5th Cir. 1980).

B. A STATE COURT MAY APPLY ITS WRONGFUL DEATH ACT IN A CASE ARISING OUT OF THE DEATH OF A NON-MARITIME CIVILIAN VOLUNTEER OCCURRING ON A DOCK LOCATED WITHIN A STATE'S TERRITORIAL WATER

For over a century state wrongful death statutes have provided a remedy to those whose decedents are killed in state territorial waters. Under the rule of The *Harrisburg*, 119 U.S. 199 (1886), general maritime law did not afford a cause of action for death resulting from a maritime tort. Thus, from 1886 until 1970 state wrongful death statutes provided the only cause of action to survivors of those killed in state territorial waters. In 1970 this court expressly overruled *The Harrisburg* in *Moragne v. State Marine Lines, Ltd.*, 398 U.S. 375 (1970) and held that federal maritime law afforded a remedy for tortious deaths occurring on state territorial waters. *Moragne*, 398 U.S. at 377. Cases decided both before and after *Moragne* indicate that the Moragne decision should not be construed as holding that general maritime law preempts state statutory remedies for those deaths.

Nevertheless, Petitioners would have this Court believe that substantive maritime law preempts state wrongful death statutes and provides a limited remedy for fatalities occurring *within state territorial waters*. They cite as authority the cases of *Moragne v. States Marine*

Lines, Inc., supra; Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974), and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). However, none of these cases stands for the proposition that federal maritime law preempts state wrongful death statutory remedies, *within state territorial waters*.

To understand what precipitated the *Moragne* decision, it is necessary to go back over one hundred years to the decision in *The Harrisburg, supra*. In that case, this Court held that maritime law did not afford a cause of action for wrongful death.

From the date of *The Harrisburg* until 1920, there was no remedy for death on the high seas. For deaths *within state territorial waters*, the federal law accommodated the humane policies of state wrongful death statutes by allowing recovery whenever an applicable state statute favored such a recovery.

Congress acted in 1920 to furnish the remedy denied by the courts for deaths *beyond the jurisdiction of any state*, by passing two landmark statutes, the Death on the High Seas Act, 46 USC § 761, as well as The Jones Act, 46 USC § 688.

It is important to note that the *Moragne* case involved a widow bringing suit in state court against the owner of the vessel to recover damages for wrongful death and for pain and suffering experienced by the decedent prior to his death, under the concept of negligence *and* under the concept of *unseaworthiness* of the vessel. The case was removed to federal court based upon diversity of citizenship. A third party complaint was filed and subsequently

both the defendant and third-party defendant sought dismissal of that portion of the Petitioner's complaint that requested damages for wrongful death on the basis of *unseaworthiness*. The defendants contended that maritime law did not provide a recovery for wrongful death within a state's territorial waters and that the statutory right of action for death under Florida law did not encompass unseaworthiness as a basis of liability. The lower courts all agreed, prompting this Court to grant certiorari.

This Court held that a non-statutory cause of action, similar to that provided under DOSHA, is available if a seaman's death is caused by the violation of traditional duties under maritime law, such as the duty to provide a seaworthy vessel. The *Moragne* Court noted that when Congress enacted the Death On The High Seas Act in 1920, it intended to leave state wrongful death remedies intact. *Moragne*, 398 U.S. at 400. However, Congress did not intend to foreclose any "non-statutory federal remedies that might be found appropriate to effectuate the policy of general maritime law." Id. Nowhere in *Moragne* did this court intimate that state wrongful death statutes were preempted by federal maritime law in this area; rather, the *Moragne* decision "merely removes the bar to access to the general maritime law." *Moragne*, 398 U.S. at 404.

If a person is injured in a *state's territorial waters*, and dies, then his survivors can recover for negligence or unseaworthiness provided that the state wrongful death statute allows recovery on such theories of liability. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959). In that case, the motor vessel TUNGUS was docked at Bayonne, New Jersey, with a cargo of coconut oil in its deep tanks. A

shore-based company was employed to handle the discharge of the cargo. Because of some pump problems, Carl Skovgaard, a foreman with the shore-based company, was summoned from his home shortly after midnight to assist in the repairwork. After arriving on board, he walked through an area in which oil had been spilled, slipped, and fell to his death in eight feet of hot coconut oil.

The widow sued in admiralty, alleging various causes of action, to include a cause of action under the New Jersey Wrongful Death Act. This Court granted certiorari to consider the relationship of maritime and local law in cases of this kind.

This Court noted the following, which is extremely important to our case:

> [A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.Ed. 239 (1942). The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose.
>
> It is manifest, moreover, that acceptance of the respondent's argument would defeat the intent of Congress to preserve state sovereignty over deaths caused by maritime torts within the state's territorial waters. The legislative history of the Death on the High Seas Act discloses a

> clear congressional purpose to leave 'unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the states.' S. Rep. No. 216, 66th Cong., 1st Sess. 3; H.R.Rep. No. 674, 66th Cong., 2d Sess.3. The record of the debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the states to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong.Rec. 4482-4486.
>
> *There is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law.* Even *Southern Pacific Co. v. Jensen,* which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.' 244 U.S. 205, at page 216, 37 S.Ct. 524, at page 529, 61 L.Ed. 1086. It would be an anomaly to hold that a state may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a state to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. *Caldarola v. Eckert,* 332 U.S. 155, 67 S.Ct. 1569, 91 L.Ed. 1968.
>
> We hold, therefore, that the Court of Appeals was correct in viewing the basic question before it as one of interpretation of the law of New Jersey. (Emphasis added).

As the above quote illustrates, the record of the debate in the House of Representatives during discussion of the bill reflected a deep concern by Congress that the power of the states to create actions for wrongful death, within their territorial waters, should in no way be affected by enactment of the federal law.

A subsequent case that discusses that same Congressional Record is *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). In that case, this Court discussed DOHSA in detail. Section 7 of DOHSA provides:

> The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any state, or to any navigable waters in the Panama Canal Zone. 46 U.S.C. § 767.

This Court noted that the Maritime Law Association (MLA), an organization of experts in admiralty law and a prime force in the movement for a federal wrongful death remedy, drafted the bill that was enacted as DOHSA. The MLA envisioned Section 7 to be a jurisdictional saving clause which completed the statutory scheme by ensuring continued concurrent state and federal jurisdiction over wrongful death claims arising from accidents on territorial waters. After discussing the *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) case, this Court stated the following:

> Although not intended to function as a substantive law saving clause, § 7 incidentally ensured that state courts exercising concurrent jurisdiction could, as under the 'saving to suitors' clause, apply such state remedies as were not inconsistent with substantive federal maritime law. It had been recognized that States could 'modify' or 'supplement' the federal maritime law by providing a wrongful death remedy enforceable in admiralty for accidents on territorial waters. See, *e.g.*, *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921); *Steamboat Co. v. Chase*, 16 Wall. 522, 32 L.Ed. 369

(1873). The reach of DOHSA's substantive provisions was explicitly limited to actions arising from accidents on the high seas, see 46 U.S.C. § 761, so as to 'prevent the Act from abrogating by its own force, the state remedies then available in state waters.' *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 617, at 621-622, 98 S.Ct., at 2013. Thus, because DOSHA by its terms extended only to the high seas and therefore was thought not to displace these state remedies on territorial waters, see *Moragne v. States Marine Lines Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), § 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court.

Although the congressional debates on § 7 were exceedingly confused and often ill-informed, the remarks of the proponents of the bill amply support the theory that § 7 originally was intended to preserve the state courts' jurisdiction to provide wrongful death remedies under state law for fatalities on territorial waters. In the debate, the discussion focused almost exclusively on the intended jurisdictional effects of that section. See 59 Cong.Rec. 4482-4485 (1920). The proponents of § 7 before its amendment expressed their resolve to save to suitors the benefits of state judicial, and, derivatively, legislative jurisdiction within state territorial waters. See, *e.g.*, *id.*, at 4482 (remarks of Rep. Montague); *id.*, at 4483 (remarks of Rep. Montague)('the territorial waters of the States shall be retained within the jurisdiction and sovereignty of the States and their courts'); *ibid.* (remarks of Rep. Montague) (§ 7, as originally drafted, was 'put in out of abundant caution, to calm the minds or those who think that rights within the territorial waters will be usurped by the national law'). They also, however, stated

their firm intent to make exclusive federal jurisdiction over wrongful death actions arising on the high seas by restricting the scope of § 7 to territorial waters. See, *e.g.*, *ibid.* (remarks of Rep. Moore)('The purpose . . . is to give exclusive jurisdiction to the admiralty courts where the accident occurs on the high seas'). Thus, they asserted that the effect of § 7, as originally drafted, would be to confer exclusive jurisdiction on the federal admiralty courts for causes of action arising on the high seas. See, *e.g.*, *ibid.* (remarks of Rep. Sanders); *id.*, at 4484 (remarks of Rep. Volstead)('This bill clearly leaves the jurisdiction exclusive in the federal court outside the 3-mile limit'). It is against this backdrop that Representative Mann introduced his amendment to § 7. To the extent that Representative Mann's specific intent in introducing his amendment can be deciphered from his contribution to the debate's confusion, his purpose appears at least consistent with the idea that § 7 would serve as a jurisdictional saving clause, as his principal concern seems to have been the recognition of state court jurisdiction over DOHSA claims. Representative Mann had, in debates over an earlier draft of DOHSA, expressed his belief that federal admiralty courts had exclusive jurisdiction over accidents occurring on the high seas. See 51 Cong. Rec. 1928 (1914). In those debates, his principal concern was that state courts would continue to enjoy concurrent jurisdiction with federal admiralty courts over causes of action arising on the Great Lakes. *Ibid.* During the debates on the bill that because DOHSA, Representative Mann continued to express his concern regarding the jurisdiction of state courts over death claims growing out of accidents on territorial waters and the Great Lakes. See, *e.g.*, 59 Cong. Rec. 4483 (1920). However, he also argued in these later debates that if

state courts had ever previously exercised jurisdiction over death claims arising on the high seas, they should be permitted to continue to do so. See, *e.g.*, *ibid.* ('Though I do not know, I suppose if a man is injured on the high seas . . . and he can get service on the defendant, as a result of that injury, he can bring suit'); *id.*, at 4484 ('I remember this bill very distinctly in previous Congresses, and . . . I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any state court'); *ibid.* ('If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by state statutes, it ought to be critically examined'). By suggesting the deletion of the language limiting the jurisdictional saving clause's scope only to territorial waters, Representative Mann intended to ensure that state courts could also serve as a forum for the adjudication of wrongful death actions arising out of accidents on the high seas. See, *e.g.*, *ibid.* (under Rep. Mann's amendment, where a state gives a cause of action and a death occurred on the high seas, 'there would be concurrent jurisdiction'); *id.*, at 4485 (if § 7 were amended as he suggested, 'the Act will not take away any jurisdiction conferred now by the states').

We conclude that Representative Mann's amendment extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters. At page 224, 225.

The *Tallentire* case is discussed in the treatise written by Wright, Miller & Cooper, *Jurisdiction*, § 3672 as follows:

> Despite the Court's stated solicitude with regard to forum choice for survivors of those killed on the high seas, the actual holding of *Offshore Logistics*, which addressed a conflict that had developed among the Courts of Appeals as to the substantive effect of the Death on the High Seas Act, resolved that conflict against the interests of most survivors. Prior to *Offshore Logistics*, several lower courts had held that the first sentence of Section 7 of the Act preserved not only concurrent jurisdiction, but also any remedies provided by the state wrongful death statutes, many of which, unlike the federal statute, provide for non-pecuniary losses. Indeed, a literal reading of the statute, which states that it shall not affect the provisions of any state statute 'giving or regulating rights of action or remedies for death' would appear to support this view. Nonetheless, in *Offshore Logistics* the Court held that when an accident falls within the provisions of the Act, state wrongful death statutes are preempted. Thus, although survivors of a person killed in an accident on the high seas have a choice of forum, they may seek only the limited recovery provided by the Death on the High Seas Act. *If the same accident occurs within a marine league from shore, where the Death on the High Seas Act has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for non-economic losses.* (Emphasis added).

Petitioners argue that § 7 requires that federal maritime law be applied to the exclusion of state remedies in all maritime death cases, even in cases arising out of accidents within state territorial waters. However, a careful reading of the *Tallentire* decision shows that this Court rejected that argument, holding that preemption applies *only* in death cases arising on the high seas (DOHSA

cases). The *Tallentire* Court noted that as originally drafted, § 7 ensured that state law remedies were available in state courts where tortious deaths occurred in state territorial waters. However, the amended version of § 7 "did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters." *Tallentire* at 225. Clearly this Court felt that in DOHSA cases § 7 operates only as a jurisdictional saving clause, whereas for deaths occurring within territorial waters, § 7 preserves state jurisdiction as well as the state remedy. Therefore, under the reasoning of *Tallentire*, the Texas Appellate Court correctly interpreted this clause.

This Court's reasoning in *Tallentire* is sound and reflects the historical concept that states have broad rights to regulate conduct within their territorial waters. In *Just v. Chambers*, 312 U.S. 383, (1941) this Court recognized that states have broad powers to establish rights and liabilities affecting maritime affairs within their borders when state action "does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations." As this court said in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, (1959)

> It is true that state law must yield to meet the uniform federal maritime law when this court finds inroads on a harmonious system. But this limitation still leaves this state a wide scope. State created liens are enforced in admiralty state remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the

> admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes . . . Thus if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. State and federal governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

Nothing in *Moragne* or *Tallentire* renders the above reasoning obsolete.

In *Moragne*, this Court did not overrule *The Tungus*, but instead overruled *The Harrisburg*. There, after discussing the legislative history of the passage of DOHSA and The Jones Act, the Court stated the following:

> Read in light of the state of maritime law in 1920, we believe this legislative history indicates that Congress intended to ensure the continued availability of a remedy, historically provided by the states, for deaths in territorial waters; its failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act. The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act preempted the entire field,

> destroying the state remedies that had previously existed.
>
> The beneficiaries of persons meeting death on territorial waters did not suffer at that time from being excluded from the coverage of the Act. To the contrary, the state remedies that were left undisturbed not only were familiar but also may actually have been more generous than the remedy provided by the new Act. 398 U.S. at 397.

On the last page of the *Moragne* opinion (398 U.S. at 408), this Court noted that both DOHSA and the numerous state wrongful death acts had been implemented with success for decades. The effect of the *Moragne* decision was to give survivors a cause of action for unseaworthiness under the federal maritime law as well as for negligence under state wrongful death statutes. State sovereignty interests in applying their death statutes still outweigh the need for complete uniformity in federal maritime law.

Petitioners cite the *Sea-land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) case as authority for the proposition that damages for mental anguish cannot be recovered for a wrongful death cause of action in a maritime setting. However, as should be abundantly clear by this point, such is the situation only when the plaintiff brings a cause of action *solely under the general federal maritime law*, rather than *a specific state wrongful death statute*. It would appear that the cause of action created by *Moragne* was intended only to fill that narrow gap where a maritime fatality occurred in state territorial waters, but when the state did *not* recognize the concept of unseaworthiness. In reading the entire *Gaudet* case, it is clear that the *Moragne*

decision should be read as filling in a narrow gap, and does not attempt to usurp the powers of the various states through their wrongful death statutes.

Petitioners cite four circuit court cases for the proposition that *Moragne* eliminated state law causes of action for deaths in territorial waters: *Lyon v. The Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988); *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980); *Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976); *Lamp v. United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970), *cert. denied* 402 U.S. 987, *reh'g denied* 403 U.S. 924 (1971). However, all of these cases involve third party actions brought by Jones Act seamen in admiralty courts. Just as federal courts have an interest in assuring that DOHSA cases are administered uniformly, they may also have such an interest in cases brought by Jones Act seamen. However, the case at bar does not present the issue of whether federal law preempts state law in such cases. Petitioners ask this Court to overrule a long line of precedent which allows states to provide a remedy for deaths occurring in their territorial waters based on three cases with facts inapposite to those in the present case.

Finally, *Lyon v. The Ranger, III*, 858 F.2d 22 (1st Cir. 1988) does not stand for the proposition for which it is cited by Petitioners. The *Lyon* case does not discuss whether federal law should preempt a state's wrongful death statute. In fact, it does not even refer to the *Moragne* decision. In *Lyon* the Court decided that Massachusetts state law should determine the definition of "joint enterprise" in a wrongful death case in which the accident took place one-quarter (1/4) of a mile from the Massachusettes coast. *Lyon*, 858 F.2d at 27.

In view of the above, Respondents submit that the Texas State Court correctly allowed judgment for Respondents for mental anguish and pre-judgment interest, since Texas statutory law provides for both.

C. THE TORT MADE THE BASIS OF THIS SUIT DOES NOT CONSTITUTE A MARITIME TORT WITHIN THE MEANING OF FEDERAL MARITIME LAW, SINCE THE CASE INVOLVES A NON-MARITIME CIVILIAN VOLUNTEER WHO WAS KILLED ON A DOCK

Petitioners further assume in their brief that all relevant acts took place on the water. Such a description is not accurate, since Dau was crushed on the side of the dock, not while he was in the water. Case law exists to support the proposition that this case does not involve a maritime tort.

A case amazingly similar to our case is *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928). In that case, T. Smith & Son was a stevedoring company which was unloading a vessel lying in the Mississippi River at a dock in New Orleans. Taylor was employed as a longshoreman by the company. At the time of the accident, cargo was being hoisted out of the hold of the vessel to deck skids. The cargo was then swung to trucks operated upon a stage that rested solely upon the wharf and projected a few feet over the water to or near the side of the vessel. Taylor was standing on the stage when a sling, loaded with five sacks of soda each weighing 200 pounds, was being lowered over the side by means of a winch on

the vessel. The sling was swinging back and forth, and while Taylor was attempting to catch and steady the sling, it struck him and knocked him off the stage into the water, where sometime later he was found dead.

The defendant, Smith & Son, claimed that the case was exclusively within the federal admiralty and maritime jurisdiction. This Court determined that if the cause of action arose *upon the river*, then the rights of the parties were controlled by maritime law, but if the cause of action arose upon the *land*, state law applied. The Court noted that the stage and wharf on which the deceased was working *were an extension of the land*. The Court ruled that the blow by the sling was what gave rise to the cause of action, and since it was given and took effect while the deceased was upon land, it was the sole, immediate and proximate cause of his death. Accordingly, state law controlled.

That line of reasoning was followed in the case of *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249 (1972). In that case, an airplane departed from the Cleveland airport, hit a flock of seagulls, lost power, crashed and ultimately sank in navigable waters of Lake Erie, approximately 1/5 of a statute mile offshore. Suit was filed, invoking federal admiralty jurisdiction under 28 U.S.C. § 1333. This Court noted that the determination of the question whether a tort is "maritime", and thus an admiralty claim, has traditionally depended upon the locality of the wrong. In the opinion, the Court discusses the *Smith & Son* case as follows:

> But it is the perverse and casuistic borderline situations that have demonstrated some of the problems with the locality test of maritime tort

> jurisdiction. In *Smith & Son v. Taylor,* 276 U.S. 179, 48 S.Ct. 228, 72 L.Ed. 520 (1928), for instance, a longshoreman unloading a vessel was standing on the pier when he was struck by a cargo-laden sling from the ship and knocked into the water where he was later found dead. This Court held that there was no admiralty jurisdiction in that case, despite the fact that the longshoreman was knocked into the water, because the blow by the sling was what gave rise to the cause of action, and it took effect on the land. Hence, the Court concluded, '[t]he substance and consummation of the occurrence which gave rise to the cause of action took place on land.' 276 U.S., at 182, 48 S.Ct., at 229. In the converse factual setting, however, where a longshoreman working on the deck of a vessel was struck by a hoist and knocked onto the pier, the Court upheld admiralty jurisdiction because the cause of action arose on the vessel. *Minnie v. Port Huron Terminal Co.,* 295 U.S. 647, 55 S.Ct. 884, 79 L.Ed. 1631 (1935). See also *The Admiral Peoples,* 295 U.S. 649, 55 S.Ct. 885, 79 L.Ed. 1633 (1935). At page 255.

Another case citing the *Smith & Son* case as authority for the principle that maritime law does not apply to accidents on piers is the case of *Rodrigue v. Aetna Casualty & Surety Company,* 395 U.S. 352 (1969). In that case two men were killed on an artificial island located on the outer continental shelf off the Louisiana coast more than one marine league. The Court, in determining that The Death on the High Seas Act was not applicable, stated that it was not enough to have the accident happen more than a marine league off of the coast, but that it must also occur on the high seas. The Court noted the following:

> Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea.

A more recent case citing the same concept is *Karpovs v. State of Mississippi*, 663 F.2d 640 (5th Cir. 1981). In that case, a raised drawbridge led to a fatality. In disposing of the question of whether federal maritime law controls, the Court stated the following:

> We first dispose of Appellant's assertion that she has stated a claim in admiralty. Maritime jurisdiction does not extend to torts occurring on piers, bridges, jettys, or even ramps or railways running into the sea. *Rodrigue v. Aetna*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). Any suggested inroads on this longstanding rule ended in 1972, when the Supreme Court held that in addition to a maritime locality, admiralty jurisdiction will not lie unless there is a significant relationship between the tort claim and traditional maritime activity. *Executive Jet Aviation & Corporation v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). *Richardson v. Foremost Insurance Company*, 641 F.2d 314 (5th Cir. 1981).

Under the above reasoning Respondents assert that this case does not fall within federal maritime jurisdiction because there was no significant relationship between the negligence claim and traditional maritime activity.

CONCLUSION AND PRAYER FOR RELIEF

Respondents respectfully urge that the Texas Trial Court correctly entered judgment in favor of Respondents under the Texas Wrongful Death Act, which provides for

recovery of damages for mental anguish. A long line of precedent establishes that state wrongful death acts provide for recovery in cases of tortious deaths occurring within state territorial waters. Further, the Texas Appellate Court correctly ruled that the accident made the basis of this suit did not constitute a maritime tort.

WHEREFORE, PREMISES CONSIDERED, Respondents request that the Petitioners' Writ of Certiorari be denied.

Respectfully submitted

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APPENDIX "A"

NO: B127026

ESTATE OF DAU VAN TRAN, ET AL	§	IN THE
	§	DISTRICT
VS.	§	COURT
	§	OF JEFFERSON
TEXACO REFINING & MARKETING	§	COUNTY, TEXAS
	§	
INC., TEXACO MARINE SERVICES INC., and FARMER BOY'S CATFISH	§	60TH JUDICIAL DISTRICT
	§	
KITCHENS INTERNATIONAL, INC.	§	
	§	

Original Answer of Defendants
Texaco Marine Services Inc. and
Texaco Refining and Marketing Inc.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Texaco Marine Services Inc., ("TMSI") and Texaco Refining and Marketing Inc., ("TRMI"), defendants herein, and file their original answer to the plaintiff's original petition, and in support thereof, respectfully show this Court as follows:

1. The plaintiffs' original petition is so incorrect and mistaken that it must be generally denied as authorized by Rule 92 of the Texas Rules of Civil Procedure, thus requiring that the plaintiffs prove their claims and allegations by a preponderance of the credible evidence as is required by the Constitution and laws of the State of Texas.

2. Without waiving the foregoing general denial, for further answer, if any be necessary, TMSI and TRMI reserve at this time their right to amend their answer to

the plaintiffs' original petition after they have an opportunity to more closely investigate these claims, as is their right and privilege under the Rules of Civil Procedure and the laws of the State of Texas.

Affirmative Defenses

3. Without waiving the foregoing general denial, for further answer, if any be necessary, and as separate and complete defenses thereto, TMSI and TRMI aver the following:

4. Plaintiffs have failed to join all necessary and indispensable parties.

5. Any injuries suffered or sustained by plaintiffs or plaintiffs' decedent at the time and place or on the occasion mentioned in plaintiffs' original petition were caused, in whole or in part, and were contributed to by the negligence, fault or want of care on the part of the plaintiffs' decedent and not by any negligence, fault or want of care on the part of TMSI or TRMI.

6. Any injuries sustained or suffered by plaintiffs or plaintiffs' decedent at the time and place or on the occasion mentioned in plaintiffs' original petition were not caused or contributed to by any fault or neglect on the part of TMSI or TRMI, or of anyone for whom TMSI or TRMI is or was responsible, or to the breach of any duty owed to plaintiffs or plaintiffs' decedent and the said injuries do not give rise to any rights cognizable herein, but were due and occasioned solely by and to the fault and negligence of third parties for whom TMSI or TRMI is and was not responsible.

7. Plaintiffs are barred from recovery by the doctrine of *volenti non fit injuria* or assumption of risk.

8. Any injuries sustained by the plaintiffs were the result of an unavoidable accident insofar as TMSI or TRMI is concerned and not due to any negligence or breach of legal duty of either of their parts.

WHERE, PREMISES CONSIDERED, defendants Texaco Marine Services Inc. and Texaco Refining & Marketing Inc. pray that plaintiffs take nothing by their suit, that defendants go hence with costs, and for such other relief as defendants may show themselves justly entitled to receive.

Respectfully submitted,

/s/ Michael C. Farrow
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OF COUNSEL:

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A Professional Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the original answer of defendants Texaco Marine Services Inc. and Texaco Refining and Marketing Inc. was mailed postage prepaid, first class mail, return receipt requested to Jon B. Burmeister, Moore, Landrey, Garth & Jones, 285 Liberty, Suite 1900, Beaumont, Texas, 77001, and Steven C. Barkley, Evans, Moses & Barkley, 815 Goodhue Building, Beaumont, Texas 77701 on this 31st day of August, 1987.

/s/ Michael C. Farrow
Michael C. Farrow